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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

Written statement submitted by the Consultative Council of Jewish Organizations, a non-governmental organization in consultative status (category II)

The Secretary-General has received the following communication, which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

[9 August 1995]

General comments

1. The CCJO has for a long time maintained a strong commitment to the cause of eliminating racial intolerance and gross violations of human rights and fundamental freedoms. Our late President Rene Cassin contributed in 1948 to the work of the United Nations in formulating the Universal Declaration of Human Rights. We have been involved for nearly 50 years with the tragedy of the Holocaust and with attempting to alleviate the plight of the victims of Nazi oppression.

2. In the immediate post-war period it was the urgent concern not only of Jewish organizations but also of the international community at large that effective measures should be taken to eliminate any risk that tragedies such as the Holocaust should ever occur again. Much time and effort was devoted to this task, in which Jewish organizations played their part. This work

eventually resulted in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948. It was the aspiration of all parties to the Convention and all who played a part in its creation that the nations of the world would not only legislate to make genocide (and indeed other large-scale and serious violations of human rights) crimes under national and international law, but also that they would establish an international tribunal which would ensure that suspected perpetrators of crimes of genocide were brought to justice and which would therefore act as a real deterrent to those who might contemplate the commission of such crimes in the future.

3. The Genocide Convention of 1948 clearly and authoritatively defined the crime of genocide. It also envisaged that cases of genocide would be referred to an international criminal court. However, it stopped short of establishing any court or tribunal having the jurisdiction and the effective power to try suspected perpetrators of crimes of genocide and to impose appropriate sentences on those found guilty.

4. Today, therefore, the CCJO welcomes the work of all concerned for an International Criminal Court. We applaud in particular the decision that the proposed International Criminal Court should have inherent jurisdiction over the crime of genocide. It is our firm view that the scheme for a statute is necessary to complete the work begun in 1948 by the making of the Convention. The measures proposed are, in our view, necessary in order to give teeth to the Convention. There has never been a time since the end of the 1939-1945 conflict when such measures have been more urgently called for.

5. It is not the intention of the CCJO to produce a detailed clause-by-clause commentary on draft statutes for such a Court. There is indeed no need for such a commentary, since we are generally in complete sympathy with the aims of the proposals. Furthermore, a considerable part of the draft statute is concerned with measures which lie somewhat outside the more immediate concern of the CCJO; for example, the measures proposed to confer "ceded jurisdiction" on the Court in respect of crimes defined under or pursuant to the list of treaties set out in the annex. There are, however, four aspects of the draft statute which in our view call for some comment: (i) jurisdiction (arts. 20-24); (ii) non bis in idem (art. 42); (iii) quorum and judgement (art. 45); (iv) applicable penalties (art. 47).

Jurisdiction

6. We have studied the provisions as to the proposed jurisdiction of the Court set out in articles 20 and 24 of the draft statute, together with the draft commentary on those articles produced by the Working Group of the International Law Commission in its report (A/CN.4/L.491/Rev.2/Add.1, pp. 16-36). The CCJO, as previously mentioned, is in complete agreement with the Working Group that "exceptionally, the Court should have inherent jurisdiction over the crime of genocide - that is to say, its jurisdiction should exist as between all States parties to the Statute, and it should be able to be triggered by a complaint brought by any State party to the Genocide Convention, as expressly envisaged in article VI of that Convention" (p. 22 of the report).

7. We are, however, still a little concerned that these proposals do not go far enough. Even under the present proposals it would still be a pre-condition to the exercise of jurisdiction by the Court over the crime of genocide that either (i) the matter had been referred to the Court by the Security Council (art. 23, para. 1) or (ii) that a complaint had been lodged with the Prosecutor by a State which was a contracting party to the Genocide Convention (art. 25, para. 1). We consider that there is a real risk that for political or other reasons suspected or even notorious cases of genocide may not be investigated by the Prosecutor if he is powerless to act unless there is a referral or a complaint from one of these sources. The case of genocide is exceptional, as recognized in the draft proposals. We consider that either there should be a new agency of the United Nations which would be charged with the task of referring to the Court suspected cases of genocide or, alternatively, the Prosecutor should be authorized to initiate an investigation into a case of genocide, even in the absence of a complaint, if it appears that a crime of genocide would not otherwise be duly investigated.

Non bis in idem

8. Article 42 enshrines the principle that no person should be tried for the same crime twice. As an exception to this principle article 42, paragraph 2 (a), would allow the International Criminal Court to try a person although he had been tried by another court for an offence arising out of the same acts if "the acts in question were characterized by that court as an ordinary crime and not as a crime which is within the jurisdiction of the Court". We regard this as an unsatisfactory, imprecise and potentially unjust provision which requires further study and clarification. The crime of murder is presumably an "ordinary crime" within the meaning of this article. If a person has once been convicted or acquitted of a charge of murder, we do not consider that he should be liable to be tried a second time by the International Criminal Court on a charge arising out of the same facts and based on one of the crimes referred to in article 20, unless, of course, the proceedings in the earlier trial were not impartial or independent or were designed to shield the accused from international criminal responsibility (art. 42, para. 2 (b)).

Quorum and judgement

9. We question whether it would generally be regarded as satisfactory that decisions of the Trial Chamber can be taken by a simple majority of the judges, so long as three judges concur as to a decision as to conviction or acquittal or as to sentence (art. 42, para. 2). In some common law countries juries are permitted to give majority verdicts and, where this is so, the majority must usually be well over 50 per cent of the jurors. But, irrespective of the position with regard to juries, which are not perhaps exactly analogous to a tribunal composed of professional judges, we wonder whether in cases of international crimes of the gravity of those specified in article 20, a decision of the Trial Chamber taken by a majority of three to two would generally be regarded as sufficiently authoritative among outside observers to justify, say, a sentence of life imprisonment. We are troubled that unless these provisions are amended, majority verdicts may tend to lessen

the prestige and reputation of the Court. If the Trial Chamber is normally to consist of five judges, our suggestion would be that, before a finding of guilt can be entered against an accused, at least four out of the five judges must concur in the verdict.

Applicable penalties

10. The Court is to impose only two kinds of penalty: imprisonment or a fine (art. 47). The CCJO would have liked to see some provision incorporated in the draft statute which would empower the Court to make an order that a person convicted of an international crime must compensate the victim or victims of his crime, as well as provisions enabling the Court to order the forfeiture of property acquired in the course of or as the result of the commission of an international crime.

11. The CCJO of course recognizes the problems involved in setting up a mechanism whereby any financial penalties, or orders for the restitution or forfeiture of property, can be enforced in practice. It is not, however, thought that these problems are in any way insuperable. A possible mechanism, it seems to us, would be for it to be provided in the Convention that Contracting States will enact domestic legislation enabling the prosecutor to apply to the domestic courts of the Contracting State for an order or orders which:

(a) Would freeze the assets of an accused person at an early stage of the proceedings; and which

(b) Would at a later stage enable any penalty ordered by the International Court to be enforced against those assets, once the accused had been convicted and sentenced.

There are indeed other possible solutions to the problem and we wonder whether more thought should not be given to this very important aspect of this matter.

12. Furthermore, the CCJO questions whether it is satisfactory that in virtually all cases the only penalty available to the Court will be that of imprisonment. We do not think that there will be many cases where a fine is appropriate. We say this since the gravity of the offences, as set out (in art. 20), is such that a mere financial penalty is unlikely to be sufficient. Moreover, before a fine can properly be imposed it will be necessary to investigate the means of the defendant so as to ensure that the proposed fine is not beyond his means. Finally, the statute does not provide any sanction where a fine is imposed and the convicted person, either deliberately or through want of means, fails to pay it. It is not, for example, provided that, in the case of a wilful failure to pay a fine, the convicted person can be punished by imprisonment.

13. The CCJO would have liked to ensure that a far wider range of penalties was available to the Court. It is critical to the success of the draft proposals that they should include compensation orders as well as orders for the forfeiture of property, as mentioned previously. Mention is made in the report of the Working Group of the possibility that the Court should be

empowered to order community service in aid of the victim or society at large. Such a sentence would require considerable resources, together with an established organization, to ensure that the sentence is properly carried out. Whilst the suggestion is an interesting one and we would welcome it, nevertheless we have some doubts as to its practicality.

14. We put forward these suggestions in the hope that they will be of assistance to the Sub-Commission in its deliberations in the forthcoming meetings which are of such great importance for us all.